

STATE OF MINNESOTA

IN SUPREME COURT

A20-1231

FILED

October 12, 2020

**OFFICE OF
APPELLATE COURTS**

In re Proposed Recall Petition to
Request the Recall of Timothy James Walz,
Governor of the State of Minnesota.

O R D E R

A proposed petition to recall Governor Timothy James Walz has been submitted to the Office of the Secretary of State. The Secretary of State determined that the proposed petition meets the requirements of Minn. Stat. § 211C.04 (2018), and forwarded the proposed petition to the Clerk of the Appellate Courts in accordance with that statute. The Chief Justice of the Supreme Court must then review the petition. *See* Minn. Stat. § 211C.05, subd. 1 (2018). The court issued an order allowing the petitioners and Governor Walz to submit materials in support of or opposition to the petition. They both filed such materials.¹

An elected state official “may be subject to recall for serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office.” Minn. Stat. § 211C.02 (2018); *see also* Minn. Const. art. VIII, § 6 (stating recall can be based on “serious malfeasance or nonfeasance”).

¹ The Governor filed his materials approximately 1 hour after the deadline in the briefing order. He has filed a motion to accept his late filing. Because the Governor has shown good cause, his motion to accept his late filing is granted.

The proposed petition challenges some of Governor Walz's actions in response to the COVID-19 pandemic. This is the third proposed petition to recall Governor Walz because of actions he took in response to the COVID-19 pandemic. The prior two proposed petitions were dismissed. *See In re Walz (Walz II)*, No. A20-0984, Order at 11 (Minn. filed Aug. 13, 2020); *In re Walz (Walz I)*, No. A20-0748, Order at 11 (Minn. filed June 15, 2020).

On March 13, 2020, Governor Walz declared a peacetime emergency due to the COVID-19 pandemic. Following the declaration of a peacetime emergency, Governor Walz issued a series of emergency executive orders related to the COVID-19 pandemic. The order at issue here is Emergency Executive Order 20-81 ("Order 20-81"), which was issued on July 22, 2020.

In Order 20-81, Governor Walz determined that starting July 24, 2020, Minnesotans are required to "wear a face covering in indoor businesses and indoor public settings" and workers are required to wear a face covering outside "when it is not possible to maintain social distancing." The face covering has to cover a person's "nose and mouth completely." "Masks that incorporate a valve designed to facilitate easy exhaling" are not a sufficient face covering. Some individuals are exempt from the face covering requirement, including people "with a medical condition, mental health condition, or disability that makes it unreasonable for the individual to maintain a face covering." The order also requires businesses to take certain actions to enforce the order's requirements.

Subject to certain exceptions, "[a]ny individual who willfully violates" Order 20-81 "is guilty of a petty misdemeanor." In addition, the Attorney General "may seek any civil relief available pursuant to Minnesota Statutes 2019, section 8.31, for violations of this

Executive Order, including civil penalties up to \$25,000 per occurrence from businesses and injunctive relief.”

ANALYSIS

The proposed petition makes four allegations with respect to Order 20-81. First, it alleges Order “20-81 is outside [Governor] Walz’s scope of authority, as [Governor] Walz may not mandate treatment under Minn. § 12.39” (2018). Second, it alleges that Governor “Walz may not prohibit a person from obtaining their choice of available treatment, for example wearing a N95 mask with an exhale valve, as Minn. Stat. § 12.21” (2018) “does not allow this prohibition.” Third, it alleges that “if masking is not treatment, then [Governor] Walz cannot require face masks under Minn. Stat. § 609.735” (2018). Fourth, it alleges that Governor “Walz may not order \$25,000 penalties for businesses under Minn. Stat. § 12.45” (2018).

The proposed petition addresses Governor Walz’s affirmative conduct, arguing that Governor Walz exceeded his authority by requiring Minnesotans to wear face coverings. These allegations fall within the scope of alleged malfeasance, rather than nonfeasance. *See In re Hatch*, 628 N.W.2d 125, 126 (Minn. 2001) (noting that malfeasance “focus[es] . . . on action taken by the official,” while “nonfeasance focuses on the official’s failure to act”).

“[M]alfeasance” has “five identifiable elements: 1. an intentional act; 2. that is unlawful or wrongful; 3. in the performance of the officer’s duties; 4. that is substantially outside the scope of the authority of the officer; and 5. that substantially infringes on the rights of any person or entity.” *In re Ventura*, 600 N.W.2d 714, 716 (Minn. 1999); *see also* Minn. Stat. § 211C.01, subd. 2 (2018) (defining malfeasance).

I.

With respect to the first element, the definition of malfeasance requires a public official's act to be "done intentionally."² *Walz I*, Order at 4–5. Order 20-81 was signed by the Governor, approved by the Executive Council, and filed with the Secretary of State; all of these acts were done intentionally. The proposed petition therefore alleges sufficient facts to satisfy the intentional act element of malfeasance.

II.

The second element—unlawful or wrongful conduct—means "conduct that is contrary to a legal standard established by law, rule or case law." *Ventura*, 600 N.W.2d at 719. The examination of this element must "turn . . . on a substantive legal standard," and not on merely "the reviewing justice's . . . subjective judgment about whether certain conduct is right or wrong." *Id.*

A.

The proposed petition alleges two separate grounds for recall based on claims related to medical treatment. The proposed petition challenges Order 20-81 by contending that Minn. Stat. § 12.39 prohibits Governor Walz from mandating treatment, in the form of the requirement to wear a mask. It also alleges that if mandating mask wearing is treatment, then Governor "Walz may not prohibit a person from obtaining their choice of

² With respect to this element, Governor Walz continues to argue that the proposed petition should be dismissed because it does not allege that he intentionally violated the law. I have previously rejected this same argument and reject it here for the same reason. *See Walz I*, Order at 4–5 (explaining that the Governor was "improperly attempt[ing] to rewrite the definition of malfeasance"); *see also Walz II*, Order at 4 n.3 ("I rejected this same argument in the first recall petition and reject it here for the same reason.").

available treatment, for example wearing a N95 mask with an exhale valve, because Minn. Stat. § 12.21 does not allow this prohibition.”

With respect to the first ground, the Governor responds that there is no conflict between Order 20-81 and Minn. Stat. § 12.39. According to the Governor, face coverings are not medical treatment and Order 20-81 does not suggest that they are intended as medical treatment. With respect to the second ground, the Governor argues that he acted well within his authority under the Emergency Management Act, Minn. Stat. ch. 12 (2018), when he issued Order 20-81.

Both of the claims in the proposed petition are based on the same premise: that the face covering required by Order 20-81 is a form of medical treatment. The petition, however, does not allege facts to establish that the face covering required by Order 20-81 is a medical treatment. The petition does not even allege that the face covering required by Order 20-81 is a medical treatment, nor does it allege any facts that would support the conclusion that the face covering required by Order 20-81 is a medical treatment. Because the proposed recall petition does not allege facts to support these grounds for recall, these claims must be dismissed. *See* Minn. Stat. § 211C.05, subd. 1 (2018) (stating that if a proposed recall petition does not “*allege[] specific facts* that, if proven, would constitute grounds for recall of the officer,” the Chief Justice “shall immediately issue an order dismissing the petition” (emphasis added)).

B.

As a separate ground for recall, the proposed petition alleges that Minn. Stat. § 609.735 prohibits the face covering that Order 20-81 requires people to wear. Minnesota Statutes section 609.735 provides that “[a] person whose identity is concealed by the

person in a public place by means of a robe, mask, or other disguise, unless based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment, is guilty of a misdemeanor.”

Petitioners claim this statute unambiguously makes it a crime to wear a mask in public, unless one of the listed exceptions applies. They contend that none of those exceptions apply to the face covering required by Order 20-81. Petitioners also argue that the Governor has conceded that face coverings conceal a person’s identity because Order 20-81 authorizes the temporary removal of a face covering “when asked to remove a face covering to verify an identity for lawful purposes.”

For his part, the Governor argues that Order 20-81 does not conflict with section 609.735 or suspend any other statute. According to the Governor, section 609.735 prohibits disguises that conceal a person’s identity, and the face covering mandated by Order 20-81 is not a disguise and does not conceal a person’s identity. The Governor also contends that even if there was a conflict between Order 20-81 and section 609.735, the more specific order would prevail under applicable law.

In order to violate section 609.735, a person must conceal their identity. *See* Minn. Stat. § 609.735 (making it a crime if a person’s “identity is concealed”). If “a statute does not define a word or phrase, [the court] construe[s] words or phrases according to their plain and ordinary meaning.” *State v. Jama*, 923 N.W.2d 632, 636 (Minn. 2019). Applying the plain meaning of both “identity” and “conceal,” it is not clear that a person who complies with Order 20-81’s face covering requirement would violate section 609.735. *See The American Heritage Dictionary of the English Language* 380, 873 (2018) (defining “identity” as “[t]he set of characteristics by which a person or thing is definitively

recognizable or known” and “conceal” as “[t]o keep from being observed or discovered; hide”). The face covering required by Order 20-81 does not hide many of the characteristics that allow a person to be recognized, such as eyes, hair, and skin color.

Other language in section 609.735 could be interpreted as prohibiting only disguises. The statute makes it a crime for a person to conceal their identity “by means of a robe, mask, or *other disguise*.” Minn. Stat. § 609.735 (emphasis added). Based on this phrasing, robes and masks could be seen as specific types of disguises that cannot be used to conceal a person’s identity. *See Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 177 (Minn. 2020) (“We do not read words in isolation; the meaning of a word is informed by how it is used in the context of the statute.”). The face covering required by Order 20-81 is not a disguise.

Finally, even if petitioner’s interpretation were accepted, it is not clear that Order 20-81 would violate section 609.735. If petitioner’s interpretation of section 609.735 is correct, then the order and the statute would be in conflict. Order 20-81 would require people to wear face coverings in public, but section 609.735 would make it a misdemeanor to wear the same face covering in public. Order 20-81 has “the full force and effect of law” during the peacetime emergency. Minn. Stat. § 12.32. When there is an irreconcilable conflict between a general law and a specific law, the specific provision controls. *See* Minn. Stat. § 645.26, subd. 1 (2018) (stating that when there is an “irreconcilable” conflict between “a general provision in a law” and a “special provision in the same or another law,” then “the special provision shall prevail and shall be construed as an exception to the general provision”).

An argument can be made that this statutory interpretation principle should be used to resolve any conflict between the order and the statute. Under this argument, because Order 20-81 applies only to a specific type of face covering that must be worn because of a specific pandemic, it is more specific than section 609.735. As a result, Order 20-81 would control and complying with the order would be considered an exception to section 609.735.

“Ultimately, a recall proceeding should not be the forum for resolving the statutory interpretation issue the parties’ arguments present.” *Walz II*, Order at 7 (explaining that “[t]he recall standard is necessarily a high one” and that “the recall process does not lend itself to resolving disputed issues of statutory interpretation such as the one presented here”); *see also Ventura*, 600 N.W.2d at 719 (concluding that the legal sufficiency of a recall petition should not “turn . . . on nothing more than the reviewing justice’s, and subsequently the supreme court’s, subjective judgment about whether the conduct is right or wrong”). Instead, to meet the recall standard, a proposed petition must allege facts demonstrating that an official’s conduct was unlawful or wrongful because it was “contrary to a legal standard *established* by law, rule, or case law.” *Ventura*, 600 N.W.2d at 719 (emphasis added).

The proposed petition fails to meet this standard. The statute, Minn. Stat. § 609.735, “does not clearly and unambiguously prohibit” Governor Walz from ordering Minnesotans to wear face coverings because of the COVID-19 pandemic. *Walz I*, Order at 9. And “no Minnesota court had, prior to” the issuance of Order 20-81, “interpreted the statute as prohibiting that conduct.” *Id.* Governor Walz’s conduct therefore was not “contrary to a legal standard established by law, rule or case law,” and is not “unlawful or wrongful” as

that term has been defined in the recall context. *Ventura*, 600 N.W.2d at 719. As a result, with respect to this ground for recall, the proposed petition does not allege facts that, if proven, would constitute malfeasance. *See Walz II*, Order at 8, 11 (dismissing proposed recall petition because it failed to allege facts that, if proven, would constitute malfeasance); *Walz I*, Order at 9, 11 (same); *Ventura*, 600 N.W.2d at 717–20 (same).

C.

As the final basis for recall, the proposed petition alleges that Governor Walz acted unlawfully because Minn. Stat. § 12.45 does not authorize him to impose civil penalties of \$25,000 on businesses. The Governor responds that Minn. Stat. § 8.31 establishes the civil penalties for business, not Order 20-81.

Order 20-81 states that “the Attorney General . . . may seek any civil relief available pursuant to Minnesota Statutes 2019, section 8.31, for violations of this Executive Order, including civil penalties up to \$25,000 per occurrence from businesses and injunctive relief.”

Petitioners are correct that Minn. Stat. § 12.45 does not expressly authorize a civil penalty for violating an emergency executive order issued during a peacetime emergency. That statute makes it a misdemeanor to violate an emergency executive order issued during a peacetime emergency and establishes a criminal penalty for that crime. *Id.* At the same time, section 12.45 expressly recognizes that there could be other penalties for violating an emergency executive order issued during a peacetime emergency. *See id.* (stating that a violation is a misdemeanor “[u]nless a different penalty or punishment is specifically prescribed”).

Minnesota Statutes section 8.31 may authorize the imposition of civil penalties for a business's violation of Order 20-81. This statute permits the Attorney General "to sue for and recover for the state, from any person who is found to have violated any of the laws referred to in subdivision 1, a civil penalty . . . not in excess of \$25,000." *Id.*, subd. 3. Subdivision 1, in turn, refers to "violations of the law of this state respecting unfair, discriminatory, and *other unlawful practices in business*, commerce or trade." *Id.*, subd. 1 (emphasis added). Order 20-81 has "the full force and effect of law" during the peacetime emergency. Minn. Stat. § 12.32. A business's violation of Order 20-81 could be seen as a "violation[] of the law of this state respecting . . . other unlawful practices in business" that is "referred to in subdivision 1." Minn. Stat. § 8.31, subds. 1, 3. Under this interpretation, such a violation would be subject to civil penalties if the Attorney General sought that relief. *Id.*, subd. 3.

But to determine if the proposed petition alleges facts establishing that Governor Walz acted unlawfully or wrongfully, I do not need to decide if section 8.31 authorizes the civil penalties referred to in Order 20-81. *See Walz II*, Order at 7 ("Ultimately, a recall proceeding should not be the forum for resolving the statutory interpretation issue the parties' arguments present); *Walz I*, Order at 9 (concluding that "[a]t this stage of the proceedings, . . . the exact contours of the governor's" statutory "authority" to issue an emergency executive order during the COVID-19 peacetime emergency "do not need to be defined"). Instead, I must decide if the proposed petition has alleged facts indicating that Governor Walz's reference to civil penalties was "unlawful or wrongful" because it was "contrary to a legal standard *established* by law, rule, or case law." *Ventura*, 600 N.W.2d at 719 (emphasis added). Because the relevant statutes do "not clearly and

unambiguously prohibit” the Governor’s conduct and “no Minnesota court had, prior to the Order being issued, interpreted the statute[s] as prohibiting that conduct,” the Governor’s conduct “is not unlawful or wrongful as that term has been defined in the recall context.” *Walz I*, Order at 9. As a result, with respect to this ground for recall, the proposed petition does not allege facts that, if proven, would constitute malfeasance. *See Walz II*, Order at 8, 11 (dismissing proposed recall petition because it failed to allege facts that, if proven, would constitute malfeasance); *Walz I*, Order at 9, 11 (same); *Ventura*, 600 N.W.2d at 717–20 (same).

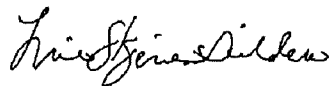
In sum, the allegations in the proposed petition for recall, even if proven, do not constitute grounds for recall, and therefore there is no basis upon which to refer this matter to a special master.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the proposed petition for recall of Governor Walz be, and the same is, dismissed.

Dated: October 12, 2020

BY THE COURT:

A handwritten signature in black ink, appearing to read "Lorie S. Gildea".

Lorie S. Gildea
Chief Justice